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NO. 222

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

WEYERHAEUSER COMPANY

*Petitioner*

*v.*

UNITED STATES OF AMERICA

*Respondent*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

# REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

There are two primary arguments first raised by the government's brief in opposition, requiring this reply. They are inconsistent with one another, and each is inconsistent with the positions taken by the government in the courts below.

First, the government asserts that the instant case is of narrow significance

because of some unidentified special and unusual facts (Br 5). The only fact that arguably might be called special or unusual, mentioned by the government in the courts below, is that the notes of the second surveyor, Heydon, report that he was unable to find some of the 41-year-old monuments of the first surveyor, Hathorn (R-76).

Second, the government asserts that, even if Heydon had been able to find Hathorn's corners, "there would have been two sets of corners along the same line--'double corners'--the Hathorn corners to govern T. 28 and the Heydon corners to govern T. 27." (Br 4, footnote 3, second sentence.)

This second argument is inconsistent with the first, in that it wipes out the only "special and unusual facts" that can be found in the case. It squarely raises the principal issue in the case,

which is whether invariably the "actual location, on the ground, of each set of monuments controlled the boundaries of the respective townships each survey created." (Br.5.)

If so, there is no closing corner rule and it is futile to argue about whether that rule is limited to terminating, as distinguished from initial, corners. (Br.4, footnote 3, first sentence.)

The government's first, or "special facts" argument is consistent with the position it maintained during most of the proceedings below, but inconsistent with the position finally taken by the government in its reply brief in the Court of Appeals, where it is stated:

> "As in other instances in the public land surveys, the monument by the applicable surveyor controls over any theoretical joinder of lines." (R. Vol. I, Rep. Br., p. 8) (Emphasis ours.)

The government's second, or "invariable actual location" argument, is inconsistent

not only with the first, but also with its position during most of the proceedings in both of the courts below.

In the government's answer brief submitted to the trial court, the government argued:

> "Had Heydon recovered the Hathorn line and corners and established his initial points for subdividing township 27 south, range 8 west, exactly on line between them, no problem would exist. Had he recovered the Hathorn corners and deviated slightly from line in establishing his own corners, the problem would be a minor one which in similar cases has been taken care of by directly connecting the corners or by offsetting the junior corners onto the senior line." (R. 123) (Unless otherwise designated, references are to Vol. II of the record.)

In its opening brief on appeal to the Court of Appeals, the government argued:

> "Where, on paper, there should have been a common boundary between the two townships, there is an area, T. 27-1/2 S., R. 8 W., which neither surveyor in fact surveyed--omitted land. This, admittedly, resulted from Heydon's inability to locate Hathorn's monuments for a distance of about three miles." (R. Vol. I, opening brief, p. 23.) (Emphasis ours.)

The government's reply brief on appeal states:

> "The field notes show that, when Heydon could not find Hathorn's corners for about three miles, he set his own (R. 76; Ex. 10). . . . The hiatus is where Heydon's line fails to coincide with Hathorn's line of Sections 3, 4 and half of 5 of Township 28, leaving a gap between the two lines." (R. Vol. I, reply brief, pp. 3, 4.)

These changes in position and inconsistencies are the inevitable result of the government's effort to sustain an untenable position. They also resulted in a rather glaring error by the Court of Appeals. The initial opinion of that court ruled against the petitioner as to an area only two and a half miles long. This might be justified by the special and unusual circumstances of the second surveyor's failure to find several monuments of the first surveyor. When it was pointed out on petition for rehearing (R. Vol. I, Pet. for Rehearing, pp. 1, 2) that this was not the entire area claimed

by the government, the opinion was modified to deny the petitioner's claim to any portion of the "area here in question and shown by the map attached hereto as Appendix 1." (C.A. Op. 4.) However, it still describes only a two and one-half mile strip (C.A. Op. 3) and does not give any reason for stretching its ruling to cover an additional one-half mile strip.

This obvious technical flaw in the opinion below focuses attention on the inconsistent positions of the government. More importantly, it strongly suggests that there is no rational basis for either position. Like Harriet Beecher Stowe's Eliza crossing the ice, if the government stands in one position it is either caught by pursuing arguments or sinks under the weight of its own excessive claim. Thus, in its brief in opposition, the government not only adopts inconsistent legal positions, but also seeks to sidestep the

factual discrepancy of more than one-half mile.

To demonstrate, the government brief indicates that the second surveyor failed to locate the first surveyor's old monuments for a distance of "two and one-half to three miles." (Br. 3.) It then describes the area in dispute as "approximately the northern boundary of Section 3, Section 4 and the east half of Section 5 of T. 28." (Br. 4), which is not the entire area in dispute. It states that "For a distance of two and one-half to three miles, Heydon's monuments were north of the line connecting the Hathorn monuments." (Br. 4.) Finally, it states that the plat and diagram of the 1961 resurvey show the respective boundaries of the earlier surveys as two separate lines "for the distance of two and one-half to three miles." (Br. 5.) In actual fact, even a cursory glance at any

of the diagrams of the area in dispute (C.A. Op., App. 1; R. 96; Ex. 1, 14, admitted R. 84) shows that the area is over three miles long. The trouble is that the "special and unusual facts" will not sustain an area more than two and one-half miles long, and the "invariable actual location rule" has some obvious and long-recognized exceptions that the government does not care to discuss.

In essence, the government has opened Pandora's box by taking a position in a double corner case based upon legal authorities applicable only to single corner cases. It has released a cloud of uncertainties that it simply cannot explain away. It now finds itself on the horns of both legal and factual dilemmas. It seeks to avoid further embarrassment, and to preserve a windfall, by foreclosing a review on the merits of the opinion of the Court of Appeals.

Specifically, it urges that this honorable Court refuse to review the decision below because it is:

(a) correct, and not in conflict with any decisions of any other courts,

(b) well-supported by a long line of cases,

(c) of narrow significance because of the special and unusual facts involved, and

(d) not of general importance and not unsettling of land boundaries.

As to point (a), the decision is not correct for the reasons and on the authorities cited (i) in petitioner's numerous briefs in the courts below, (ii) in the trial court opinion, (iii) in the Petition for Rehearing in the Court of Appeals, (iv) in the Petition for Certiorari, and (v) elsewhere in this reply brief. As to "conflict" with other decisions, the petition does not assert conflict as a grounds

for review, but rather that the opinion below passes upon an important federal question not heretofore considered by this honorable Court, or squarely decided in other reported decisions.

As to point (b), the long line of cases clearly are not applicable to double corner situations. The citation to the text of Patton on Land Titles is merely repetition of the same inapplicable rule. Moreover, the government fails to heed that author's admonition that boundary and survey law is a separate subject from land titles, and that in order to understand land descriptions a lawyer should first bone up on the latter subject by reading texts such as Clark on Surveying and Boundaries. (1 Patton, Land Titles, § 52 at footnote 46, p. 202 (2nd ed.), 1957.) Furthermore, if the "long line of cases" are applicable to double corner situations, then all references to closing corners

in the judicial decisions, treatises, and in the government's own highly regarded Manual of Instructions for the Survey of the Public Lands of the United States (first published in 1855) are clearly in error.

As to points (c) and (d), the government has abandoned its prior contention on special or unusual facts (probably because it cannot sustain the full scope of the decision below on any such facts).

The government asserts, in footnote 3 on page 4 of its brief in opposition, that its position applies to all double corner situations, fairly common along the nearly two million miles of township boundaries in the United States. Thus the case obviously is of general importance and will be of extremely broad significance. It will allow the government to "find" accidental gaps in double corner situations and establish ownership

of gores, strips or slivers where no one, including the abutting owners, has dreamed that such nuisance ownerships exist.

CONCLUSION

The trial court was correct. It found "particular and controlling interest" in the exhibit attached to the second surveyor's instructions, showing the south boundary of Township 27 to have been already surveyed (R. 87, 88, Pet. App. A, trial court opinion, p. 5). It emphasized that the second surveyor's instructions were to retrace the 6th Standard Parallel South as established by the senior surveyor (R. 87, 94, Pet. App. A, trial court opinion, pp. 5, 13). It noted that the official plat of the survey of Township 27 shows the 6th Standard Parallel as established by the first or senior surveyor as the south boundary of that township (R. 88, 89, Pet. App. A, trial court opinion, p. 6). Thus, in essence, it held that the

second surveyor's monuments were closing corners. It applied the closing corner rule by stating that there is and can be but one 6th Standard Parallel South dividing Townships 27 and 28, which was established by the senior surveyor (r. 93, 94, Pet. App. A., trial court opinion, p. 12), and by stating that the junior surveyor's monuments cannot stand as controlling the south boundary of Township 27 (R. 94, 95, Pet. App. A., trial court opinion, p. 13).

The Court of Appeals decision is not correct. Even though it does not mention the closing corner rule, it would abolish that rule (a) by stating that two Standard Parallels can in fact exist in nearly the same location (R. Vol. II, C.A. Op. 6, 7) and (b) by failing to recognize the distinction between retracing and establishing a Standard Parallel (or other township exterior) as noted by the

trial court. It decides against the petitioner (but only the concurring opinion expressly rules that the government owns the strip in dispute), apparently because it disagrees with some remarks in the trial court opinion. In seeking to apply the wisdom of centuries of land law, it totally disregards that part of the ancient lore applicable to closing corners. It confuses monuments with boundaries. As a result, it "perceives" as "the decisive issue" (C.A. Op. 7) that petitioner is laying claim to land "outside the boundaries of Heydon's survey" of Township 27. The disputed area lies outside the monuments of the Heydon survey, but the true decisive issue is whether it lies within the boundaries of Township 27.

The Petition for Certiorari should be granted, and the decision of the Court of Appeals should be reviewed

on the merits. The relationship between the actual location rule and the closing corner (or double corner) rule should be recognized and clarified by this honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, one of the attorneys for the petitioner Weyerhaeuser Company in the foregoing and annexed proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 12th day of August, 1968, I served copies of the Reply to Brief in Opposition by mailing three copies thereof in a duly addressed envelope, with airmail postage prepaid, to

The Honorable Erwin Griswold
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

and that all parties required to be served have been served.

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